

ESTTA Tracking number: **ESTTA633441**

Filing date: **10/16/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059220
Party	Defendant Stockmarket Burger Inc.
Correspondence Address	PAULO A DE ALMEIDA PATEL & ALMEIDA PC 16830 VENTURA BLVD, SUITE 360 ENCINO, CA 91436 UNITED STATES Paulo@PatelAlmeida.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Paulo A. de Almeida
Filer's e-mail	Paulo@PatelAlmeida.com
Signature	/Paulo A. de Almeida/
Date	10/16/2014
Attachments	Respondent's Motion to Dismiss_STOCKMARKET.pdf(202564 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH,)	
)	Cancellation No. 92059220
Petitioner,)	Registration No: 4481899
)	Mark: STOCKMARKET (& Design)
v.)	
)	
STOCKMARKET BURGER, INC.,)	
)	
)	
Respondent.)	
)	
)	
)	

RESPONDENT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Respondent, Stockmarket Burger, Inc. ("Respondent") respectfully submits this Motion to Dismiss the Petition for Cancellation ("Petition") filed by Petitioner, Red Bull GmbH ("Petitioner") on the ground that, as a matter of law, Respondent's "STOCKMARKET and bull/swirl/wind design" is not confusingly similar in appearance, sound, meaning, or commercial impression to any of the registered or alleged common law marks pleaded by Petitioner, Red Bull GmbH ("Petitioner").¹

Statement of Facts

Respondent's mark is STOCKMARKET (& Design) of Reg. No. 4481899, depicted as follows:

¹ Petitioner's remaining claim(s) of "Nonuse and False Declaration" may also be dismissed for lack of standing in the event the Board dismisses the claim of priority and likelihood of confusion. Petitioner has no standing to maintain such claims if there is no likelihood of confusion and thus no damage to Petitioner.

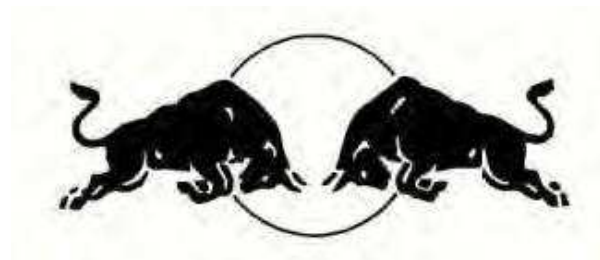


for use in connection with:

Bar services; Cafe services; Cocktail lounge services; Coffee bars; Coffee shops; Coffee supply services for offices; Contract food services; Fast-food restaurant services; Frozen yogurt shop services in the nature of a restaurant; Mobile restaurant services; Rental of drink dispensing machines; Rental of drinking water dispensers; Restaurant and cafe services; Restaurant services; Take-out restaurant services; Wine bars

in International Class 43 (the "STOCKMARKET Mark"). Petitioner alleges that Respondent's STOCKMARKET Mark is likely to cause confusion with its four pleaded registered marks for various goods and services in various classes², all containing bull designs (hereinafter, "Petitioner's Marks"):

- Reg. No. 2,946,045 (two charging bulls design)



- Reg. No. 3,051,994 (two charging bulls design)

² Petitioner's numerous alleged goods and services are not important for this particular motion and are not recited here. However, Petitioner has identified the "relevant" goods and services in ¶¶ 3-6 of the Petition.



- Reg. No. 3,561, 283 (RED BULL & bull design)

Red Bull



and

- Reg. No. 4,031,959 (RED BULL ARENA & bull, area, and soccer ball design)



Petitioner also pleaded an unspecified number of "common law" trademarks purportedly containing unspecified bull designs, described in the Petition as follows:

Petitioner Red Bull is also the owner of various common law rights for the trademarks RED BULL, RED BULL & Two Bulls Logo, Two Bulls Logo and (Single) Bull Logo, and other marks incorporating the word BULL, and/or the design of a bull or bovine animal for various goods and services. . . .

Petition at ¶ 7.

As an initial matter, it is unclear whether Petitioner's alleged common-law design marks "RED BULL & Two Bulls Logo" and "Two Bulls Logo" correspond to the designs of pleaded Reg. Nos. 2946045, 3051994, 3561283, and 4031959 (shown above), or some other purported marks not shown in the Petition. Further, the pleaded common-law mark "(Single) Bull Logo" is not depicted visually anywhere in the Petition. As a result, Respondent cannot ascertain which mark the "(Single) Bull Logo" mark refers to based on the pleadings.

To the extent the "common law" marks consist of designs which are not shown in the Petition, the Board should not consider them because the marks are not sufficiently pleaded to state a plausible claim for relief. Specifically, and at the very least, the Board should not consider Petitioner's claims of priority and likelihood of confusion based on its alleged "common law" trademark "(Single) Bull Logo" because this design mark is not identified in the pleadings sufficiently to plausibly state a claim for likelihood of confusion. Simply put, Respondent cannot identify the mark which it must address in its defense.

Turning to the merits of this Motion, a simple comparison of the visual features of the STOCKMARKET Mark and Petitioner's Marks shows that they are utterly dissimilar in appearance, sound, meaning, and commercial impression, which precludes a finding of likelihood of confusion. *See In re E.I. DuPont DeNemours & Co.*, 177 USPQ 563 (CCPA 1973). Even if the Board assumes that all other *DuPont* factors weigh in Petitioner's favor, the dissimilarities between the marks are so great as to preclude a likelihood of confusion. The Board may reach the conclusion that confusion is not likely based on a consideration of the dissimilarities of the marks *alone*. *See Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951

F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (single du Pont factor of dissimilarity of marks outweighed all others such that other factors, even if decided in nonmovant's favor, would not be material because they would not change the result). Accordingly, Respondent's Motion to Dismiss should be granted, and Petitioner's claim of priority and likelihood of confusion should be dismissed with prejudice.³

Legal Standard

To survive a motion to dismiss, a complaint must “state a claim to relief that is plausible on its face”. TMBP § 503.02; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (“Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence [to support plaintiff's claims]”). Here, the marks are utterly dissimilar in appearance, sound, meaning, and overall commercial impression. The complaint does not state a plausible claim for relief and must be dismissed.

The Marks Are Dissimilar in Appearance, Sound, Meaning, and Commercial Impression

The Lanham Act prohibits registration of a mark on the Principal Register that would create a likelihood of confusion. 15 U.S.C. § 1052(d). Whether a mark is likely to cause confusion under Section 2(d) is a question of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1565, 4 U.S.P.Q.2d 1793, 1797 (Fed. Cir. 1987); *Monarch Marking Systems, Inc. v. Elan Systems, Inc.*, 39 U.S.P.Q.2d 1035 (TTAB 1996); *Blansett Parmacal Co. Inc. v. Carmic*

³ If the Board finds no likelihood of confusion, the remaining claim(s) may be dismissed for lack of standing.

Laboratories, Inc. 25 U.S.P.Q.2d 1473, 1476 (TTAB 1992); *Blue Cross and Blue Shield Ass'n v. Harvard Community Health Plan, Inc.*, 17 U.S.P.Q. 1075 (TTAB 1990).

"[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks." *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enterprises, Inc.*, *supra* (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989)(court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES). *See also Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80 USPQ2d 1381 (TTAB 2005) (dissimilarity of the marks ONFOLIO and design and CARTAGIO dispositive); *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive).

Here, the marks are completely different in appearance, sound, meaning, and commercial impression, which precludes a finding of likelihood of confusion. *See In re E.I. DuPont DeNemours & Co.*, 177 USPQ 563 (CCPA 1973). The circumstances here are similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in that the single *DuPont* factor of the dissimilarity of the marks in their entireties substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion. Even if the Board assumes that all other *DuPont* factors weigh in

Petitioner's favor, such as the relationship between the goods and services and the alleged fame of Petitioner's mark, the dissimilarities of the marks is so great as to avoid likelihood of confusion.

1. Appearance

The STOCKMARKET Mark and Petitioner's Marks are completely different in appearance. Respondent's mark clearly features the word STOCKMARKET, which is not present in any of Petitioner's Marks. Respondent's mark also features a bull emerging from the top of a unique and distinctive "swirl of wind" design. Unlike Respondent's mark, three of Petitioner's Marks feature two bulls charging against each other with a circle in the background, and the fourth mark features a single, charging bull and a stylized depiction of an arena and a soccer ball. None of Petitioner's Marks features a "swirl of wind" or similar design, and three of them are immediately distinguishable because they contain two bulls instead of one. Petitioner's fourth mark contains other immediately distinguishing features such as the words RED BULL ARENA, a stylized depiction of an arena, and a soccer ball. In short, the marks are highly dissimilar owing to the clear differences between the bulls and the inclusion of other distinguishing words and designs.

Petitioner's position is simple: that the marks are similar and likely to cause confusion merely because they all contain "bulls" or "bovine animals". However, the mere fact that the marks share a common element is not enough to show a likelihood of confusion. *See Red Carpet Corp. v. Johnstown Am. Enters.*, 7 USPQ2d 1404 (TTAB 1988) (holding mark consisting of a highly stylized house design for use in connection with real estate property management, and mark consisting of a highly stylized house design for use in connection with real estate brokerage services, not likely to cause confusion); *Ocean Spray Cranberries, Inc. v. Ocean Garden Prods.*,

Inc., 223 USPQ 1027 (TTAB 1984) (holding mark consisting of a circle containing three curved lines with rounded ends, for seafood, and mark consisting of a stylized breaking wave within an oval, for various food items including juices and fruits, not likely to cause confusion); *see also* *Sears, Roebuck & Co. v. Hofman*, 258 F.2d 953, 119 USPQ 137 (C.C.P.A. 1958) (holding marks sharing "a crown surmounted by three feathers" not similar due to other distinguishing features, including different words).

In the present case, the differences between Respondent's and Petitioner's particular bull designs are immediately clear, and the marks also contain distinguishing features such as a swirl of wind, a stadium, and a soccer ball. At the very least, the inclusion of the word STOCKMARKET in Respondent's Mark changes the marks in appearance such that confusion is not likely. Overall, when Respondent's Marks and Petitioner's Marks are compared in their entireties—including all of the distinguishing word and design features—the differences in appearance are so great as to avoid a likelihood of confusion. *See Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272 (C.C.P.A. 1974).

2. Sound

The marks are completely different in sound. The design portions of the STOCKMARKET Mark and Petitioner's Marks do not have a sound and cannot be found to be similar in this respect. The word portions of the marks—RED BULL, RED BULL ARENA, and STOCKMARKET—are completely different in sound. At the very least, the Board should find that Respondent's STOCKMARKET Mark is not similar in sound to any of Petitioner's Marks, which do not contain STOCKMARKET or any similar words. Accordingly, the marks are

dissimilar in sound.

3. Meaning

The marks are completely different in meaning. Respondent's STOCKMARKET Mark shows a bull emerging from a swirl of wind. The bull is not "charging" like Petitioner's bulls. The poses of the bulls are different, and thus the connotations are not the same. Further, Respondent's STOCKMARKET Mark connotes the *stock market*, a meaning which is not shared by any of Petitioner's Marks. The inclusion of STOCKMARKET thus changes the overall connotations of the marks. Accordingly, when the marks are compared in their entireties, the marks are dissimilar in meaning.

4. Commercial Impression

Respondent's STOCKMARKET Mark conveys the impression of a bull emerging from the top of a swirl of wind. Three of Petitioner's Marks show two bulls charging against each other, which creates a completely different overall impression. Petitioner's fourth mark conveys the impression of a single charging bull and a sports arena—an impression completely dissimilar from Respondent's bull emerging from a swirl of wind. The words RED BULL and RED BULL ARENA also convey a completely different commercial impression from STOCKMARKET, which connotes the *stock market* and not a sports arena. Simply stated, Respondent's and Petitioner's marks complain completely different words and designs, and they do not share the same commercial impression.

Overall, the marks are dissimilar in appearance, sound, meaning, and create dissimilar commercial impressions. See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d

1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enterprises, Inc.*, *supra* (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989) (court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES). *See also* *Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80 USPQ2d 1381 (TTAB 2005) (dissimilarity of the marks ONFOLIO and design and CARTAGIO dispositive) and *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive) *Red Carpet Corp. v. Johnstown Am. Enters.*, 7 USPQ2d 1404 (TTAB 1988) (holding mark consisting of a highly stylized house design for use in connection with real estate property management, and mark consisting of a highly stylized house design for use in connection with real estate brokerage services, not likely to cause confusion); *Ocean Spray Cranberries, Inc. v. Ocean Garden Prods., Inc.*, 223 USPQ 1027 (TTAB 1984) (holding mark consisting of a circle containing three curved lines with rounded ends, for seafood, and mark consisting of a stylized breaking wave within an oval, for various food items including juices and fruits, not likely to cause confusion); *see also* *Sears, Roebuck & Co. v. Hofman*, 258 F.2d 953, 119 USPQ 137 (C.C.P.A. 1958) (holding marks sharing "a crown surmounted by three feathers" not similar due to other distinguishing features, including different words).

In view of the clear differences between the marks, there is no likelihood of confusion as a

matter of law. The Board may reach this conclusion solely by comparing the marks in their entirety for dissimilarities in appearance, sound, meaning, and commercial impression. It is beyond dispute that Respondent's and Petitioner's marks contain different features. The differences are so great as to preclude a likelihood of confusion under Section 2(d). Accordingly, Petitioner's allegations of priority and likelihood of confusion are not even plausible, and its claims must be dismissed with prejudice.

Conclusion

Based on the foregoing, Respondent's Motion to Dismiss should be granted, and Petitioner's claims should be dismissed with prejudice.

Respectfully submitted,

Date: October 16, 2014

/Paulo A. de Almeida/
Paulo A. de Almeida
Alex D. Patel
Patel & Almeida, P.C.
16830 Ventura Blvd., Suite 360
Encino, CA 91436
(818) 380-1900

Attorneys for Respondents,
Stockmarket Burger, Inc.

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **RESPONDENT'S MOTION TO DISMISS** has been served on Martin R. Greenstein, counsel for Petitioner, on October 16, 2014 via First Class U.S. Mail, postage prepaid to:

Martin R. Greenstein
TechMark a Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124-5273

/Paulo A. de Almeida
Paulo A. de Almeida